Suzana bt Md Aris (claiming as administrator of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v DSP Ishak bin Hussain & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–21–61 OF 2000
LEE SWEE SENG JC
14 SEPTEMBER 2010

Civil Procedure — Damages — Aggravated damages — Aggravated damages not specifically pleaded by plaintiff — Whether plaintiff's plea for general damages sufficient — Whether court entitled to award aggravated damages if pleaded and proved facts justified award

Civil Procedure — Damages — Aggravated damages — Death of victim in police custody — Whether aggravated damages recoverable by dependants — Whether aggravated damages reflected court's and society's abhorrence — Whether aggravated damages reflected public's negative reaction to apathy, abuse and abdication of duty by police

Civil Procedure — Damages — Assessment of damages — Appeal against assessment by registrar — Whether judge ought to be slow to disturb such assessment

Constitutional Law — Fundamental liberties — Right to life and liberty — Deprivation of fundamental rights — Whether 'vindicatory damages' recoverable

Constitutional Law — Fundamental liberties — Right to life and liberty — Person deprived of medical care and attention in police custody — Whether deprivation a deprivation of person's right to life and liberty — Whether deprivation tantamount to torture, cruel and inhumane treatment — Whether aggravated and exemplary damages recoverable for oppressive, arbitrary or unconstitutional action by servants of the state — Federal Constitution Part II — Universal Declaration of Human Rights 1948

Damages (Personal Injury or Death) — Action for — Dependency claim — Death of victim in police custody — Death caused by police negligence — Children of deceased victim of tender age and in formative years — Whether award of RM200,000 for each of victim's two children reasonable

Damages (Personal Injury or Death) — Action for — Dependency claim — Death of husband and father due to breach of fundamental liberty and basic human rights — Whether dependants entitled to recover aggravated and exemplary damages — Civil Law Act 1956 s 7

Tort — Damages — Negligence — Death of victim in police custody — Death of victim due to negligence of police in providing medical care and attention — Whether aggravated and exemplary damages recoverable

Words and Phrases — 'enshrined' — Human Rights Commission of Malaysia Act 1999 s 2

The plaintiff's husband ('the victim') died whilst in police custody. The facts indicated that the victim had vomited blood whilst under detention but was denied proper medical care and attention. The plaintiff sued the defendants in negligence. The High Court judge allowed the plaintiff's claim against the third and fourth defendants with costs. Loss and damages were ordered to be assessed by the registrar as agreed to by the parties. The SAR awarded a sum of RM137,220 with interest. The parties were dissatisfied and appealed to the judge against the SAR's decision.

Held, allowing the appeal with costs:

(1) A judge should be slow to disturb the assessment of damages of a registrar after hearing witnesses unless it could be shown for a fact that the assessment had proceeded on wrong principles or that based on the evidence the award had been wrongly excessive or woefully inadequate. In the instant appeal, the High Court would agree with the registrar's very careful and comprehensive calculation which took into consideration the various concerns, criteria and contingencies. The third and fourth defendants' appeal should thus be dismissed with costs (see para 13).

(2) The High Court was however moved to add the following awards: (i) RM200,000 for each of the victim's two children as his dependants; (ii) aggravated damages of RM500,000; and (iii) exemplary damages of RM500,000 (see para 38).

(3) The victim's two children of tender age and in their formative years were the victim's dependants. The combined sum of RM400,000 (RM200,000 each) for the sustenance, support and education of the victim's two children based on his station, stature and status in society would not be unreasonable for bringing up the children — two boys — in Selangor (see paras 15–16); *Alameloo Mangai a/p P Gunasekaran & Anor v Ketua Polis Negara & 3 Ors* (Civil Suit No S1–21–172 of 1998) referred.

(4) Although the plaintiff had not specifically pleaded aggravated damages, the plaintiff had pleaded general damages which covered aggravated damages as well. The court may award aggravated damages where the facts as pleaded and proved at the trial are such that the negligent acts of the defendant justify the award. The court's and society's abhorrence of what had happened in police custody resulting in the untimely death of the victim at the age of 31 was reflected in the aggravated damages award of RM500,000. The award also reflected the public's aghast, alarm and anger aroused by the apathy, abuse and abdication of duty by the police (see paras 17 & 21); *Ng Chooi Aw & Anor v Eng Ah Jam & Anor* [2008] 4 CLJ 642 referred; *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 referred.

(5) In the instant appeal, the award of exemplary damages was based on the oppressive, arbitrary or unconstitutional action by the servants of the government. Where a person in police custody is deprived of medical attention and assistance, he is deprived of his life while his liberty is being deprived by law in the case of a lawful arrest and detention. The Universal Declaration of Human Rights 1948 ('UDHR') is part of Malaysian jurisprudence to the extent it is not inconsistent with the Federal Constitution. For the state to deprive a person of medical treatment promptly when he is in police custody, especially when he is in pain and vomiting blood, as in the instant case, is to subject the person to torture, cruel, inhuman or degrading treatment by default — contrary to provisions of the UDHR (see paras 26–27); *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 referred; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 referred.

(6) The courts may award exemplary damages in a case under s 28A of the Civil Law Act 1956 which provision deals with the factors that are to be taken into account in assessing damages in personal injury cases not resulting in death. Similarly, there should be no bar to any court granting the family of a person whose death has been the result of a breach of a fundamental liberty of the person under the Constitution. Fundamental liberties are enshrined in Part II of the Federal Constitution and the word 'enshrined' means to protect that which is innate and inviolable, sacrosanct and sacred. The law does not state that no exemplary damages are to be awarded where a person is dead due to a breach of his fundamental liberty and basic human rights. Thus one should not infer that exemplary damages are not recoverable in such a case (see paras 33–34); *Mariayee & Anor v Mohamed Naslr & Anor* [1985] 1 MLJ 427 distinguished; *Muhamad bin Hashim v Teow Teik Chai & Anor* [1996] 4 MLJ 7 distinguished; *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 referred; *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324 referred.

(7) Even if the court was wrong in awarding the RM500,000 as exemplary damages, the same amount could be awarded as 'vindicatory damages' in line with the growing jurisprudence on the subject of the breach of a fundamental liberty by an agent of the state (see para 37).

[Bahasa Malaysia summary

Suami plaintif ('mangsa') meninggal dunia semasa di dalam jagaan polis. Fakta menunjukkan bahawa mangsa telah muntah darah semasa di dalam tahanan tetapi dinafikan bantuan perubatan dan perhatian yang betul. Plaintif menyaman defendan-defendan untuk kecuaian. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif terhadap defendan ketiga dan keempat dengan kos. Kerugian dan ganti rugi diperintahkan untuk ditaksirkan oleh pendaftar seperti yang dipersetujui oleh pihak-pihak. Timbalan pendaftar kanan ('TPK') mengawardkan sejumlah RM137,220 dengan faedah. Pihak-pihak tidak puas hati dan merayu kepada hakim terhadap keputusan TPK tersebut.

Diputuskan, membenarkan rayuan plaintif dengan kos:

(1) Hakim sewajarnya tidak campur tangan dalam taksiran ganti rugi pendaftar selepas pendengaran saksi-saksi kecuali ia dapat ditunjukkan sebenarnya taksiran dimulakan atas prinsip yang salah atau berdasarkan keterangan award telah secara salah berlebihan atau amat menyedihkan tidak mencukupi. Dalam rayuan ini, Mahkamah Tinggi akan bersetuju dengan pengiraan yang teliti dan menyeluruh pendaftar yang mengambilkira pelbagai kepentingan, kriteria dan kontingensi. Rayuan defendan ketiga dan keempat patut ditolak dengan kos (lihat perenggan 13).

(2) Mahkamah Tinggi walau bagaimanapun memutuskan untuk menambah award-award berikut: (i) RM200,000 untuk setiap kedua-dua anak mangsa sebagai tanggungannya; (ii) ganti rugi tambahan sejumlah RM500,000; dan (iii) ganti rugi teladan sejumlah RM500,000 (lihat perenggan 38).

(3) Kedua-dua anak mangsa yang masih kecil dan di dalam tahun-tahun formatif mereka adalah tanggungan mangsa. Jumlah penggabungan RM400,000 (RM200,000 setiap seorang) untuk makanan, bantuan dan pelajaran kedua-dua anak mangsa berdasarkan kedudukannya dan status di dalam masyarakat adalah munasabah untuk membesarkan anak-anak lelaki di Selangor; *Alameloo Mangai a/p P Gunasekaran & Anor v Ketua Polis Negara & 3 Ors* (Guaman Sivil No S1–21–172 Tahun 1998) dirujuk.

(4) Walaupun plaintif tidak secara spesifik memplid ganti rugi tambahan, plaintif telah memplidkan ganti rugi am yang juga meliputi ganti rugi tambahan. Mahkamah mungkin mengawardkan ganti rugi tambahan

jika fakta seperti yang diplidkan dan dibuktikan di perbicaraan adalah tindakan-tindakan cuai defendan yang menjustifikasikan award. Kebencian mahkamah dan masyarakat terhadap apa yang telah terjadi semasa di dalam jagaan polis yang mengakibatkan kematian mangsa yang bukan pada waktunya pada umur 31 digambarkan di dalam award ganti rugi tambahan sejumlah RM500,000. Award juga menggambarkan terkejut, kebimbangan dan kemarahan masyarakat berbangkit daripada acuh tak acuh, penyalahgunaan dan pelepasan tugas oleh polis (lihat perenggan 17 & 21); *Ng Chooi Aw & Anor v Eng Ah Jam & Anor* [2008] 4 CLJ 642 dirujuk; *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 dirujuk.

(5) Dalam rayuan ini, award ganti rugi teladan adalah berdasarkan tindakan menindas, sewenang-wenangnya atau tidak berperlembagaan kakitangan kerajaan. Jika seseorang di dalam jagaan polis dinafikan perhatian dan bantuan perubatan, dia dinafikan untuk hidup sementara kebebasannya dinafikan dari segi undang-undang dalam kes penangkapan dan tahanan yang sah. Universal Declaration of Human Rights 1948 ('UDHR') adalah sebahagian daripada jurisprudens Malaysia dan konsisten dengan Perlembagaan Persekutuan ('Perlembagaan'). Apabila kerajaan menafikan seseorang rawatan perubatan serta merta semasa dia di dalam jagaan polis, terutamanya semasa dia di dalam kesakitan dan muntah darah, seperti dalam kes ini, adalah mendedahkan seseorang itu kepada penyeksaan, kejam, bukan seperti manusia atau menjatuhkan maruah yang mana bertentangan dengan peruntukan-peruntukan UDHR (lihat perenggan 26–27); *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 dirujuk; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 dirujuk.

(6) Mahkamah mungkin mengawardkan ganti rugi teladan di dalam kes di bawah s 28A Akta Undang-Undang Sivil 1956, peruntukan yang mana menguruskan faktor-faktor yang akan diambil kira di dalam mentaksirkan ganti rugi di dalam kes-kes kecederaan diri yang tidak mengakibatkan kematian. Begitu juga, tidak patut terdapat halangan kepada mana-mana mahkamah dalam memberikan kepada keluarga seseorang yang kematiannya telah diakibatkan oleh pelanggaran kebebasan asasi seseorang di bawah Perlembagaan. Kebebasan asasi disemadikan di dalam Bahagian II Perlembagaan Persekutuan dan perkataan 'enshrined' bermaksud untuk melindungi sesuatu yang semula jadi dan tidak boleh dicabul, suci dan murni. Undang-undang tidak menyatakan bahawa tiada ganti rugi teladan akan diawardkan di mana seseorang mati akibat pelanggaran kebebasan asasinya dan hak manusia yang asas. Oleh itu seseorang tidak patut membuat kesimpulan bahawa ganti rugi teladan tidak boleh diperoleh di dalam kes sedemikian (lihat perenggan 33–34); *Mariayee & Anor v Mohamed Naslr & Anor* [1985] 1 MLJ 427 dibeza; *Muhamad bin Hashim v Teow Teik Chai & Anor* [1996]

4 MLJ 7 dibeza; *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 dirujuk; *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324 dirujuk.

(7) Walaupun mahkamah adalah salah di dalam mengawardkan RM500,000 sebagai ganti rugi teladan, jumlah tersebut boleh diawardkan sebagai 'vindicatory damages' selaras dengan jurisprudens yang semakin bertambah atas perkara kemungkiran kebebasan asasi oleh ejen kerajaan (lihat perenggan 37).]

Notes

For a case on aggravated damages, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2467.

For cases on assessment of damages, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2469–2491.

For cases on dependency claim, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 343–348.

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 208–226.

For cases on right to life and liberty, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2219–2220.

Cases referred to

Alameloo Mangai a/p P Gunasekaran & Anor v Ketua Polis Negara & 3 Ors (Civil Suit No S1–21–172 of 1998), HC (refd)

Ashley v Chief Constable of Sussex Police [2008] 2 WLR 975, HL (refd)

Attorney General of Trinidad and Tobago v Ramanoop [2005] 2 WLR 1324, PC (refd)

Jenniffer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira [2009] 7 MLJ 711, HC (refd)

Lai Hie Hua v Lim Teong Yu & Anor [2008] MLJU 856; [2009] 1 CLJ 98, HC (refd)

Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675; [2005] 4 CLJ 871, CA (refd)

Mariayee & Anor v Mohamed Naslr & Anor [1985] 1 MLJ 427, SC (distd)

Muhamad bin Hashim v Teow Teik Chai & Anor [1996] 4 MLJ 7; [1996] 1 CLJ 615, HC (distd)

Ng Chooi Aw & Anor v Eng Ah Jam & Anor [2008] 4 CLJ 642, HC (refd)

Noraini bte Omar (wife of the deceased, Ku Amirul bin Ku Mansor) & Anor v Rohani bin Said and another appeal [2006] 3 MLJ 150; [2006] 1 CLJ 895, CA (refd)

Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269, FC (refd)

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)
Zulkifli bin Ayob v Velasini a/p K Madhavan & Anor [2000] 1 MLJ 593; [2000] 1 CLJ 117, HC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(1), (2), (3)(iv)(d), (3A), (6), 8, 8(2)(a), 28A
Criminal Procedure Code s 117
Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 3, 4(1)(b)
Fatal Accidents Act 1976 [UK]
Federal Constitution art 5(1), Part II
Human Rights Commission of Malaysia Act 1999 ss 2, 4(4)
Law Reform (Miscellaneous Provisions) Act 1934 [UK] s 1(1)

P Uthayakumar (Kumar Hashimah & Co) for the plaintiff.
Wan Roslan bin Wan Ismail (Federal Counsel, Attorney General's Chambers) for the defendants.

Lee Swee Seng JC:

PROLOGUE

[1] This is the sad story of a man who died in police custody. The world will little remember and indeed have long forgotten that there was a man, Mohd Anuar bin Sharip, who was rudely awakened from his sleep near midnight on 10 August 1999 and whisked away in the dark of the night into the police lock up in Rawang. That was the last time his family saw him. On 16 August 1999 he vomited blood and on 19 August 1999 he collapsed and died in his cell.

[2] Death in police custody is always a most disturbing and distressing thing. It raises once again the spectre of suspicion that something is not quite right in the institution represented by the men in blue. Is it the taunt, threats and torture that some complained they suffered while in police custody; is it the deplorable condition of the lock ups and prison cells; is it the humiliation or the hapless cry for help for medical attention and assistance?

PARTIES

[3] The suit was filed in the year 2000 by the deceased's wife suing on behalf of the late husband's estate as well as being a dependant of the deceased. The other two dependants are the two sons who were aged three and nine years old.

[4] The deceased had been arrested and detained under s 117 of the Criminal Procedure Code on suspicion of being a drug addict. The arrest was made under s 3 of the Drug Dependants (Treatment and Rehabilitation) Act 1983. He was produced before the magistrate within 24 hours of his initial arrest and was ordered by the magistrate to be detained for 14 days pursuant to s 4(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

[5] The first defendant DSP Ishak bin Hussain was the Head of Criminal Investigation for the District of Gombak. The second defendant ACP Massari bin Hashim was the District Police Chief for Crime for Gombak. The third defendant Tan Sri Norian Mai was the then Inspector General of Police. The fourth defendant is the Government of Malaysia as employer of the first, second and third defendants.

PROBLEM

[6] On 16 August 1999 the deceased vomited blood while under detention in his cell. The judge who heard the case, His Lordship Kang Hwee Gee J (as he then was) expressed doubt as to whether the deceased was subsequently brought to the Klinik Kesihatan Rawang. Two days later on 18 August 2009 the deceased complained of stomach ache and again His Lordship expressed doubt as to whether the deceased was brought to the same clinic where he was said to have been prescribed some gastric pills by a hospital assistant. A day later on 19 August 1999 at about 1.30am he was found unconcious in his cell and a doctor who was summoned to attend to the deceased arrived at the cell later in the morning and pronounced him dead!

[7] The plaintiff sued based on negligence on the part of the defendants in the execution of their duties in detaining the deceased Mohd Anuar bin Sharip.

[8] His Lordship in a written judgment made on 20 October 2009 agreed with the evidence of Dr Lee Tiong See who did the post mortem that in all probabilities the deceased died of massive pleural effusion secondary to bronchopneumonia. Dr Lee had agreed with the finding of Dr Michael Devaraj Jeyakumar, the thoracic physician called by the plaintiff that the deceased had had severe lung infection arising from 'casseous necrosis' that is to say the presence of tuberculosis for at least two to three months before his death. His Lordship had also accepted the evidence of Dr Michael Devaraj Jeyakumar that the medical condition is not a terminal disease and had the police acted responsibly and had sent the deceased to hospital earlier he could have been treated and saved. It was His Lordship's finding of fact in a trial that stretched over 15 days from 2006–2009 that:

A As a detainee the deceased would not be free to have himself medically attended to as he would a free man. Having taken the deceased lawfully under its custody his wellbeing was in the hands of the police for as a detainee he would not be in a position to have himself medically attended to as he would a free man. The police therefore owed him a duty of care to ensure the appropriate medical care would be extended to him during the period he was in its custody within the criteria set in *Caparo Industries plc v Dickman and others* [1990] 1 All ER 568 ...

The evidence shows that the defendants were in breach of that duty. Having taken the deceased into their custody it was incumbent on the police to ensure that the health and wellbeing of the deceased were taken care of. Whether or not he was being brought at all to the Pusat Kesihatan Rawang to be attended to by the hospital assistant was doubtful ... In any case even if he had in fact been brought to see a hospital assistant this would not have been enough to discharge that duty considering the seriousness of the deceased's condition. It was reasonably foreseeable that a failure to properly and adequately attend to the deceased's serious condition would result in serious injury to his health. His later complaint of stomach ache and loss of appetite after the first episode underscores the failure on the part of the police to discharge that duty of care.

The fact that the deceased had been suffering from tuberculosis before he was taken into custody would not exonerate the defendants from liability as they would have to 'take their victim as they find him under the egg-shell skull principle'. See *Azizi bin Amran v Hizzam bin Che Hassan* [2006] 4 MLJ 555; [2006] 2 CLJ 821.

[9] Having found that no evidence with respect to the culpability of the first and second defendants were offered as parties causing the death of the deceased the learned judge had dismissed the plaintiff's claim against them with costs and found the third and fourth defendants liable in negligence for the death of the deceased.

[10] As agreed by the parties the loss and damages were left to be assesed by the registrar.

[11] The senior assistant registrar Fa'erah Nurul Ainni, in a carefully written grounds of assessment of damages had awarded the sum of RM137,220 under the following heads:

(a) Future loss of support	RM8,000
RM72,000–RM64,000 = RM8,000	
'Loss of dependency' for the plaintiff (according to s 7(3)(iv)(d) of the Civil Law Act 1956 based on *Lai Hie Hua v Lim Teong Yu & Anor* [2008] MLJU 856; [2009] 1 CLJ 98)	
RM500 per month X 12 per month X 12 years of purchase =RM72,000	

(b) Pre trial loss of support (according to the authority of *Zulkifli bin Ayob v Velasini a/p K Madhavan & Anor* [2000] 1 MLJ 593; [2000] 1 CLJ 117 and *Noraini bte Omar (wife of the deceased, Ku Amirul bin Ku Mansor) & Anor v Rohani bin Said and another appeal* [2006] 3 MLJ 150; [2006] 1 CLJ 895) RM500 x 128 months (19 August 1999 to 26 April 2010)	RM64,000
(c) Bereavement (according to s 7(3A) of the Civil Law Act 1956)	RM10,000
(d) Funeral expenditure (according to the authority of *Zulkifli Ayob*'s case)	RM3,000
(e) General damages for pain and suffering (according to the case of *Jenniffer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira* [2009] 7 MLJ 711)	RM2,220
(f) Aggravating factors including the delay in providing medical treatment.	RM50,000
Total	RM137,220

Interest at 4%pa for special damages (RM64,000) from the date of death until the date of judgment.

Interest at 8%pa for general damages (RM2,200) for pain and suffering from the date of service of writ to the date of judgment.

Interest at 8%pa on the sum of RM137,220 from the date of judgment to the date of realisation.

[12] Both sides not being happy with the award had appealed to me against the decision of the registrar.

PRINCIPLES

[13] A judge would be slow to disturb the assessment of damages of a registrar made after hearing witnesses unless it can be shown for a fact that the assessment had proceeded on wrong principles or that based on the evidence the award had been wrongly excessive or woefully inadequate. I found myself in agreement with what I would consider to be a very careful and comprehensive calculation taking into consideration the various concerns, criteria and contingencies circumscribed by ss 7 and 8 of the Civil Law Act 1956. I therefore dismissed the third and fourth defendants' appeal with cost.

[14] I would add to what the registrar had awarded the following heads of damages.

A sum of RM200,000 for each of the two children as dependants of the deceased

[15] They were three and nine years when their father breathed his last.

There is no doubt that the two children of a tender age in their formative years are dependants of the deceased father. The combined sum of RM400,000 for the sustenance, support and education of his two children as his dependants based on his station, stature and status in society would not be unreasonable for bringing up two boys in Selangor.

[16] I was referred to the unreported case of *Alameloo Mangai a/p P Gunasekaran & Anor v Ketua Polis Negara & 3 Ors* (Civil Suit No S1–21–172 of 1998), Kuala Lumpur High Court made available in the plaintiff's bundle of authorities where a suspect died in police custody and the mother of the two teenage girls were shot dead by the police. A consent judgment was recorded on a without admission of liability basis where each child was awarded RM200,000. In our present case, as the trial judge had found the third and fourth defendants liable, the sum of RM400,000 would be modestly adequate an award.

Aggravated damages of RM500,000

[17] I had awarded aggravated damages of RM500,000 to the plaintiff. The defendants' counsel had objected to this on the ground that 'aggravated damages' was not specifically pleaded. The plaintiff had pleaded general damages and that covers aggravated damages as well. In any event where the facts as pleaded and proved at the trial are such that the negligent acts of the defendants justify an award of aggravated damages, the court may so award it. The matter had been considered in *Ng Chooi Aw & Anor v Eng Ah Jam & Anor* [2008] 4 CLJ 642 at p 654 where Ahmadi Asnawi JC (as he then was) said:

> I allowed the first appellant's claim for aggravated damages. In this respect I rejected the respondent's submission that the claim under this head was not properly pleaded by the first appellant. I am satisfied on the authorities that it was sufficient for the first appellant to plead 'general damages' in her statement of claim to enable her to claim aggravated damages — see *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497; [2001] 4 CLJ 433. It is trite law that aggravated damages are part of general damages and thus need not be specifically pleaded. In *Ansell v Thomas* [1974] Crim LR 31, Edmund Davies LJ held that aggravated damages is to compensate the plaintiff for injuries affecting his feelings arising out of the tortious acts of the defendants and in assessing this, all circumstances of the case must be taken into account, including the character of the plaintiff. In *Cassel & Co Ltd v Broome and another* [1972] AC 1027, Lord Diplock described aggravated damages as ... 'compensation for the injured feelings of the plaintiff where his sense of injury resulting from wrongful physical act is justifiably heightened by the manner in which or motive for which fhe defendant did it ...'

[18] In the House of Lords' case of *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 at p 1006, Lord Neuberger of Abbotsbury observed:

Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant. If that is so, I cannot see why such damages should not logically be recoverable in some categories of negligence claims. In the present case, for instance, it must have been reasonably foreseeable (the normal tort test) that a negligently mishandled armed police raid could result in just the sort of mental distress or shock that aggravated damages are intended to reflect. It appears to me that it would be reminiscent of the bad old days of forms of action if the court held that the Ashleys' claim could result in aggravated damages if framed in battery, but not if framed in negligence. In my view, there is a strong enough case for saying that aggravated damages would be recoverable for the instant negligence for the point to have been validly conceded by the chief constable.

[19] In the above case the son and the father of the deceased had sued as dependants of the deceased under the UK Fatal Accidents Act 1976 and the father on behalf of the estate of the deceased under the s 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. As stated in the Federal Court case of *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 at p 270:

... The first principle which regarded death as not giving rise to any cause of action was rectified by s 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of a cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act 1934. The provisions of these two UK statutes are now incorporated in ss 7 and 8 of our Civil Law Act 1956.

[20] *Ashley*'s case was about a raid by the police on the deceased's flat in the early hours of the morning for drugs. As can be gleaned from the headnotes:

The deceased was shot and killed by one police officer though he was naked and unharmed. The officer was charged for murder but was acquitted owing to absence of evidence to negate his assertion that he acted in self defence. The father and son of the deceased sued the chief constable of the defendant police force for damages for, inter alia, assault and battery, negligence and false imprisonment in respect of the planning and execution of the raid. The defendant admitted liability in negligence and false imprisonment and agreed to pay all damages flowing from the incident but resisted the assault and battery claim on the basis that the officer had acted in self defence and applied for it to be struck out. The judge held that the burden of proving that the police officer had not acted in self defence lay on the claimants and that, given the lack of evidence at the criminal trial to disprove the officer's belief that he had been in imminent danger of attack, the claim had no real prospect of success and was to be struck out. The Court of Appeal by a majority allowed the battery claim to proceed to trial notwithstanding that the chief constable's concession on damages precluded any additional damages being payable.

On appeal by the chief constable, the House of Lords dismissed the appeal and by a majority held that the claimants had an arguable case in assault and battery which, since it raised issues different from those on which the criminal trial had turned,

could proceed without constituting a collateral attack on the officer's acquittal, and which (per Lord Scott of Foscote and Lord Neuberger of Abbotsbury), in so far as it was being pursued for the purpose of vindicating a contention that the victim's death had been caused by unlawful battery rather than for the purpose of obtaining compensation, could nevertheless be pursued 'for the benefit of' the deceased's estate within the meaning of s 1(1) of the 1934 Act; and that (Lord Carswell and Lord Neuberger of Abbotsbury dissenting) the claim was not to be prevented from proceeding to trial by reason of the facts that it could not result in the award of further compensatory damages and was being pursued in order to vindicate the claimant's contention that the police officer had unlawfully killed the deceased.

[21] There is justified indignation and outcry, a righteous anger rightly aroused as to why anyone should die in police custody. If at all the suspicion was valid that the deceased was a drug addict, there is really no urgency in arresting him in the middle of the night. Even if that had been necessary there would still have been no real need to get a maximum 14 days detention for investigation when a urine test result could be out pretty soon. What cannot be condoned is the lackadaisical attitude of the police when the deceased vomited blood and complained of stomach ache. When the deceased was discovered to be unconscious at 1.30am on 19 August 1999, nothing was done until the doctor came in the morning and confirmed the deceased had died. The deceased must be writhing in pain and crying for help as that is a natural response of a man in pain. Nature has a way of helping us cope with pain and when the pain is too unbearable, we suffer a blackout and become unconscious. The police could have rushed him to the hospital. By not doing so they were playing doctors, deciding on when an arrested person should be given medical treatment. Standards of decency must be preserved and all human life is precious. Everyone is to be treated with dignity and respect irrespective of his standing in society whether he be a quite decent person or a suspected drug addict. To aggravate matters the plaintiff was given a run-a-round with respect to where to claim the body of the deceased. The court's and society's abhorrence of what had happened in police custody resulting in the untimely death of the deceased at the age of 31 is reflected in the 'aggravated damages of RM500,000' awarded reflecting the public's aghast, alarm and anger aroused by such apathy, abuse and abdication of duty on the part of the police.

Exemplary damages of RM500,000

[22] The basis for awarding 'exemplary damages' has been captured in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675; [2005] 4 CLJ 871 in the words of Gopal Sri Ram JCA (as he then was):

I now turn to consider the award of exemplary damages. The basis for making an award of exemplary damages was set out by Lord Devlin in *Rookes v Barnard and others* [1964] AC 1129, where after a discussion of some of the authorities on the subject he proceeded as follows:

> These authorities convince me of two things. First, that Your Lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.
>
> The first category is oppressive, *arbitrary or unconstitutional action by the servants of the government*. I should not extend this category — I say this with particular reference to the facts of this case — to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages. (Emphasis added.)

[23] Only the first category would concern us in this discussion on whether the award of 'exemplary damages' should be given.

[24] Article 5(1) in Part II of the Federal Constitution states in crisp and clear language the constitutional protection of life and liberty:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[25] In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at p 289; [1996] 2 CLJ 771 at p 801 Gopal Sri Ram JCA (as he then was) drew inspiration in interpreting our art 5(1) from two decisions of the Indian Supreme Court:

> The first of these is *Olga Tellis v Bombay Municipal Corp* AIR 1986 SC 180 at p 193, where Chandrachud CJ said:

A For purposes of argument, we will assume the factual correctness of the premise if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by art 21 B (the equivalent of our art 5(1)) is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. *An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the* C *means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live*. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of D the right to life. *That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.* (Emphasis added.)

The second is *Delhi Transport Corporation v DTC Mazdoor Congress & Ors* 1991 E Supp(1) SCC 600 at p 717, Satwant J when delivering the majority judgment of the Supreme Court said:

The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many F fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

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[26] In a case where a person in police custody is deprived of medical attention and assistance, that person is deprived of his life while his liberty is being deprived by law in the case of a lawful arrest and detention. Nothing can buffer the harsh reality that a person who is being deprived of his liberty is in a H more vulnerable position of being deprived of life when his plea for medical help falls on deaf ears and is being brushed aside as being a nuisance. When a person is most vulnerable, he looks to the vindication of the law as the vanguard in protecting, promoting and defending his basic human right. To be deprived of having access to the basic amenities of life, that of having access to medical I help when one is sick, is to be deprived of life in the true sense of it in all its fullness. It is all the sadder when a person is being deprived of both liberty and life even before he is charged for an offence, tried and convicted. Even then it is in the most serious of crime that a person is deprived of his life in accordance with the law.

[27] The fundamental liberties in Part II of the Federal Constitution are the human rights referred to in the Human Rights Commission of Malaysia Act 1999. In carrying out the purpose of the Act, the Commission shall have regard to the Universal Declaration of Human Rights 1948 ('UDHR') to the extent that it is not inconsistent with the Federal Constitution. See s 4(4) of the Act. Article 3 of the UDHR states that everyone has the right to life, liberty and security of person. Article 5 of the UDHR further states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The UDHR is part and parcel of our jurisprudence as the international norms in the UDHR are binding on all member countries unless they are inconsistent with the member countries' constitutions. For the state to deprive a person of medical treatment promptly when a person is in police custody, especially when the person is in pain and has just vomited blood, is to subject the person to torture, cruel, inhuman or degrading treatment by default though not deliberately by design.

[28] Learned federal counsel submitted that Parliament had taken away the right of this court to award 'exemplary damages' in a case where the person had died though his cause of action had survived as provided for in s 8(2)(a) of the Civil Law Act 1956:

> Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of the person —
>
> (a) *shall not include any exemplary damages*, any damages for bereavement made under section 7(3A), any damages for loss of expectation of life and damages for loss of earnings in respect of any period after that person's death; (Emphasis added.)

[29] My attention was drawn to the Federal Court case of *Mariayee & Anor v Mohamed Naslr & Anor* [1985] 1 MLJ 427 at p 430 where Seah SCJ said that:

> Lastly, it was submitted by learned counsel for the plaintiffs that the learned trial judge erred in law in holding that the plaintiffs were not entitled to exemplary damages in all the circumstances and the pleadings herein. No authority binding on this court had been cited in support of such a proposition. In our judgment, this contention was entirely without merit and appears to be contrary to the law. Section 8(2)(a) of the Civil Law Act 1956 enacts that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any exemplary damages. There is no reason, in our opinion, why this provision should not be extended to cover a claim made for and on behalf of the dependents of the deceased.

[30] It is an argument from silence that the administrators of the deceased estate could not claim exemplary damages under s 7 of the Civil Law Act 1956. The opening words of s 7(1) reads:

A 7 Compensation to the family of a person for loss occasioned by his death

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for
B damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].

C **[31]** Section 7(6) of the Civil Law Act 1956 provides:

(6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect, or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.

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[32] Parliament could easily have inserted in s 7(6) that any pecuniary loss to the estate of the deceased shall not include a claim for exemplary damages but it had not done so. One wonders if there is any rationale if in a valid award of
E 'exemplary damages' for a person injured because of breach of his fundamental liberty as for example the person had been injured because of a shot fired at him when he was unarmed, naked and not running away as in the House of Lords' case of *Ashley*, the same should not be available to his family just because he had died. The title to s 7 states:

F Compensation to the family of a person for loss occasioned by his death

[33] The courts have no problem awarding 'exemplary damages' in a case where it is justified under s 28A of the Civil Law Act 1956 which deals with the
G factors that shall be taken into account in assessing damages recoverable in respect of personal injury which does not result in death even when the words 'exemplary damages' are not referred to. Similarly there should be no bar to any court granting the family of a person whose death had been the result of a breach of a fundamental liberty of the person under the Constitution. I was
H also referred to *Muhamad bin Hashim v Teow Teik Chai & Anor* [1996] 4 MLJ 7 at p 13; [1996] 1 CLJ 615 at p 619 where Jeffrey Tan JC (as he then was) held that a claim by persons qualified under s 7(2) for 'loss of support' is nothing more than a claim made for and on behalf of the dependants of a deceased.

I **[34]** However the above two cases where exemplary damages were not granted were not cases involving an argument on the breach of the fundamental right of the person under the Federal Constitution. Here it had been pleaded in the reply to the defence filed that the defendants had infringed and violated art 5(1) of the Federal Constitution. The importance of the

fundamental liberties provision of the fundamental Constitution is underscored by the fact that s 2 of the Human Rights Commission of Malaysia Act 1999 in defining 'human rights' said it refers to fundamental liberties as *enshrined* in Part II of the Federal Constitution. The word 'enshrined' is a powerful word properly placed to protect that which is innate and inviolable, sacrosanct and sacred. All that Parliament says is that there shall be no award of 'exemplary damages' under s 8 of the Civil Law Act. It does not say and so we cannot infer from silence that under no circumstance is 'exemplary damages' to be awarded in the case where the person injured is dead even if it be a breach of his fundamental liberty and basic human right that had resulted in his death. Otherwise the 'fundamental liberties' protection of the Federal Constitution will be mere pious platitudes with no effective protection against state's encroachment or excesses. Any award for breach of the 'fundamental liberties' protection of the Federal Constitution stands on a separate head by itself. It must not be forgotten that the Civil Law Act 1956 had come into force on 7 April 1956 in West Malaysia before the supreme law of the land, the Federal Constitution came into force on 31 August 1957.

[35] The English House of Lords had wrestled with this issue because of a similar prohibition to award exemplary damages under s 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. I can do no better than to quote from the speech of Lord Scott of Foscote in *Ashley*'s case at pp 985–986:

> The claim forms issued by the Ashleys simply seek damages for the torts giving rise to the deceased Mr Ashley's death. These torts include, of course, the assault and battery tort. The only legitimate purpose for which Fatal Accident Act damages can be claimed and awarded for this tort is, in my opinion, compensatory. The damages are awarded for a loss of dependency. But the purposes for which damages could have been awarded to the deceased Mr Ashley himself, if he had not died as a result of the shooting, are not confined to a compensatory purpose but include also, in my opinion, a vindicatory purpose. In *Chester v Afshar* [2005] 1 AC 134 at para 87, Lord Hope of Craighead remarked that 'The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached' and that unless an infringed right were met with an adequate remedy, the duty would become 'a hollow one, stripped of all practical force and devoid of all content'. So, too, would the right. How is the deceased Mr Ashley's right not to be subjected to a violent and deadly attack to be vindicated if the claim for assault and battery, a claim that the chief constable has steadfastly and consistently disputed, is not allowed to proceed? Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how compensatory damages could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place. In *Daniels v Thompson* [1998] 3 NZLR 22 at p 70 Thomas J observed that 'Compensation recognises the value attaching to the plaintiff's interest or right which is infringed, but it does not place a value on the fact the interest or right ought not to have been infringed at all'. In a later case, *Dunlea v*

> *Attorney-General* [2000] 3 NZLR 136, Thomas J drew a distinction between damages which were loss-centred and damages which were rights-centred. *Damages awarded for the purpose of vindication are essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all*. In *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 the Privy Council upheld an award of vindicatory damages in respect of serious misbehaviour by a police officer towards the claimant. These were not exemplary damages; they were not awarded for any punitive purpose. They were awarded, as it was put in *Merson v Cartwright and another* [2005] UKPC 38, another case in which the Privy Council upheld *an award of vindicatory damages, in order 'to vindicate the right of the complainant* ... to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression': para 18. The rights that had been infringed in the *Ramanoop*'s case and in *Merson v Cartwright and another* were constitutional rights guaranteed by the respective constitutions of the countries in question. *But the right to life, now guaranteed by article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and incorporated into our domestic law by the Human Rights Act 1998, is at least equivalent to the constitutional rights for infringement of which vindicatory damages were awarded in Ramanoop and Merson v Cartwright and another*. It is, of course, the case that if self defence can be established as an answer to the Ashleys' claims of tortious assault and battery no question of vindicatory damages will arise. But, unless the claim can be said to have no reasonable prospect of success, that is no reason why the assault and battery claim should not be permitted to proceed to a trial. (Emphasis added.)

[36] The relevant parts of the judgment of the Privy Council decision from Trinidad and Tobago in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] 2 WLR 1324, reflecting the seriousness with which courts view a breach of constitutional protection of fundamental liberties that have been infringed by the state and the remedies available, are captured in the speech by Lord Nicholls of Birkenhead at pp 1329–1330:

> Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of Chapter 1, rights and freedoms. This jurisdiction is an integral part of the protection Chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ('without prejudice to') all other remedial jurisdiction of the court.
>
> An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. *The fact that the right violated was a constitutional right adds an extra dimension to the wrong*. An additional award, not necessarily of substantial size, may be needed *to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches*. All these elements have a place in this additional award. 'Redress' in s 14 is apt to encompass such an award if the court considers it is required having regard to

all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award.

[37] Assuming for a moment that I had been wrong in awarding a sum of RM500,000 under the head of 'exemplary damages', I state that the same amount can be awarded under 'vindicatory damages' in line with the growing jurisprudence on this subject of a breach of a fundamental liberty protection which the state is duty bound to safeguard but instead had breached it through its agents.

PRONOUNCEMENT

[38] Based on the aforesaid I had made in summary the following additional awards of damages:

(a) A further sum of RM400,000 being the dependency claims for the two children of the deceased.

(b) A further sum of RM500,000 being aggravated damages.

(c) A further sum of RM500,000 being exemplary damages/vindicatory damages.

[39] I had also awarded interest at the rate of 8%pa from the date of death 19 August 1999 to date of payment on the above three heads of awards. The appeal of the plaintiff is thus allowed with costs.

POSTSCRIPT

[40] Let the message go forth from this place that any more deaths in police custody would be one too many! Those with power to arrest and detain must ensure that the basic human rights of a detainee to seek medical treatment while in custody, is immediately attended to. There should be no more wanton and wasted loss of life in police custody for every life is precious. It is hoped that this award would have served a triune purpose compensatory, vindicatory and deterrent — underscoring the importance of the constitutional safeguards and the gravity of its breach as well as deterring future breaches.

[41] We believe most officers in the police force are honest and hardworking, disciplined and dedicated, striving to maintain peace and order so that we all may pass placidly by as we pursue our passions, dreams and goals. As is so often the case, the strength of the chain is to be found in the weakest link and the

beauty of the whole marred by a tiny ugly spot. The safest place to be in should not by default be turned into the most dangerous place to be taken to. This award is not a victory for anyone but a vindication of the basic human rights of every citizen under the Federal Constitution.

Appeal allowed with costs.

Reported by Andrew Christopher Simon